

**Lockheed Martin Astronautics and Joseph F. Fiala
and Anthony H. Romano and Lee Gutierrez.**
Cases 27-CA-14557, 27-CA-14600, 27-CA-
14605, and 27-CA-15118

September 28, 2000

**SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND LIEBMAN**

On June 27, 2000, Administrative Law Judge Albert A. Metz issued the attached supplemental decision.¹ The Respondent filed exceptions and supporting arguments, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions and to adopt the recommended Order.

¹ On January 6, 2000, the Board issued a Decision and Order in the captioned cases. 330 NLRB 422. Although it decided the majority of the issues presented, the Board found it necessary to remand the proceedings to the judge for further findings and conclusions with regard to the allegations that the Respondent unlawfully suspended and discharged Lee Gutierrez. The judge's supplemental decision addresses the issues that were the subjects of the remand.

² The Respondent has excepted to the judge's denial of its motion to reopen the record to receive the testimony of Jay Buehler, who was responsible for making the final decision to discharge Gutierrez. We find no merit in that exception. A party moving to reopen the record must state "the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing." Sec. 102.48(d)(1) of the Board's Rules and Regulations. The proffered testimony meets none of those requirements. The Respondent does not specify what testimony Buehler would give (it says only that he would describe the Respondent's practices for dealing with employees who make threats), and it does not claim that his testimony would require a different result. Nor does the Respondent have any satisfactory explanation for Buehler's failure to testify at the hearing; indeed, it admits that he was available to testify at that time. The Respondent does not contend—nor could it—that Buehler's evidence is newly discovered or has become available only since the close of the hearing. The Respondent's contention that Buehler's testimony became relevant only after the remand is entirely meritless. That testimony, through which the Respondent apparently would attempt to establish the validity of Gutierrez' discharge, was every bit as relevant at the time of the hearing as it would have been on remand. See *A. N. Electric Corp.*, 276 NLRB 887, 897 (1985).

³ The Respondent has excepted to the judge's finding that on May 1, 1996, Gutierrez was questioned by the Respondent concerning employees' discussions of employee Jolene Conn's medical situation. There is no merit in that exception. The judge's finding is consistent with his earlier findings, based on Gutierrez' apparently credited testimony, to which the Respondent did not except.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Lee Gutierrez for 3 days on May 1, 1996, and by discharging him on January 30, 1997. The judge found that Gutierrez' protected discussions of employee Jolene Conn's medical restrictions were a substantial motivating factor in the Respondent's decision to suspend him, and that the Respondent had not demonstrated that it would have suspended him even absent his protected activity.⁴ The judge also found that Gutierrez' discharge violated Section 8(a)(3) and (1) because it was based on his entire disciplinary record, including the unlawful suspension,⁵ and because the Respondent had not demonstrated that it would have discharged him even absent his protected discussions.

In its exceptions, the Respondent contends that the judge erred in finding that Gutierrez' suspension was substantially motivated by his protected conduct. We find no merit in that contention. As the judge found, Gutierrez' suspension letter lists his protected conduct as one of the reasons for his suspension. The letter is consistent with Gutierrez' credited testimony that the Respondent's employee relations administrator, Deanna Duca, informed him on May 1 that he was being suspended in part for his protected discussions.⁶ The judge's finding that Gutierrez' protected conduct was a motivating factor in his suspension thus is well supported by the record.

The Respondent also argues, on the basis of Duca's testimony, that it would have suspended Gutierrez solely because of his threatening remarks to employee Steve Piccioni. The judge discredited Duca's testimony in that regard, however, partly because of her demeanor and partly because of the statements in Gutierrez' suspension letter. In substance, the Respondent invites us to overrule the judge's credibility determination. We decline the invitation. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.⁷ We have carefully examined the record and find no basis for reversing the judge's findings.

The Respondent further contends that, even if Gutierrez' suspension was unlawful, his discharge was valid because the General Counsel did not show that the discharge was substantially motivated by the suspension

⁴ *Wright Line*, 251 NLRB 1083 (1980).

⁵ *Soltech, Inc.*, 306 NLRB 269, 279 (1992).

⁶ As noted above, the Respondent did not except to the judge's crediting of Gutierrez' account of his May 1 interview.

⁷ *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

and because Gutierrez would have been discharged even if he had not been suspended. Again, we find no merit in those contentions.⁸ As the judge found, Gutierrez' discharge letter stated that the discharge was based on his past disciplinary record, which included the May 1 suspension. Duca testified to the same effect. In fact, Duca admitted that the suspension was the most severe discipline in Gutierrez' record and that it was an important consideration in the Respondent's decision to discharge him. She did not claim that he would have been discharged even if he had not been suspended. The record thus clearly supports the judge's findings that the Respondent relied in part on the unlawful suspension in making the decision to terminate Gutierrez, that his discharge was motivated in substantial part by his protected activities, and that the Respondent failed to show that it would have discharged him had he not engaged in those activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lockheed Martin Astronautics, Littleton, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Michael T. Pennington, Esq., for the General Counsel.
Matthew Coyle, Esq. and *Dane A. Bartlett, Esq.*, for the Respondent.

SUPPLEMENTAL DECISION

ALBERT A. METZ, Administrative Law Judge. By decision dated January 6, 2000, the Board remanded a portion of this case for further findings concerning the suspension and discharge of Lee Gutierrez.¹ On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' supplemental briefs, I make the following findings

I. BACKGROUND

The facts are fully set forth in the Board's decision. The events relevant to Lee Gutierrez are as follows. On May 1, 1996, the Respondent suspended Gutierrez for 3 days. Two reasons were given for the suspension. One was that Gutierrez had made threatening remarks to guard Steve Piccioni. The other was that he had disobeyed the Respondent's instructions and talked to other employees about the investigation of fellow employee Jolene Conn's ADA complaint. On January 30, 1997,

⁸ The Respondent's arguments are contrary to an earlier representation to the Board. In its reply brief in support of its previous exceptions, the Respondent stated that "[i]t is not Respondent's position that the discharge would have taken place without the disciplinary underpinning of the suspension. If the discharge is suspect [sic], it is because the suspension was one of the factors weighed in the discharge decision."

¹ 330 NLRB 422

Gutierrez was discharged. His discharge notice stated that he was being terminated for leaving the plant premises without permission on January 22, 1997, and after "careful consideration of [his] past work record."

II. APRIL 24 "COUNSELING"

On April 24, 1996, Gutierrez was interviewed by Respondent's agents, Duca and Campbell, concerning alleged threats to Piccioni and his knowledge of discussions among employees about Conn's medical situation. The General Counsel argues that Gutierrez' April 24 counseling for "inappropriate comments and behavior" constituted unlawful discipline.² The Respondent contends, however, that, as both Duca and Campbell testified, it did not consider the counseling to be discipline, and that, for that reason, Duca did not consider it part of Gutierrez' disciplinary record when deciding to discharge him. In this instance I credit Duca and Campbell that the April 24 counseling of Gutierrez did not amount to discipline.³ I credit Duca's testimony that this counseling was not considered by the Respondent in discharging Gutierrez.

III. SUSPENSION

During a May 1, 1996 meeting, Gutierrez was questioned by the Respondent about employees' discussions concerning Conn's medical situation. At the conclusion of the meeting Gutierrez was suspended for 3 days. He was subsequently given a letter dated May 1 concerning his suspension. The letter states two reasons why he was being suspended. The first reason concerned threatening statements he made to Piccioni. The second reason cited was:

In addition, on May 1, 1996, you admitted you had talked with fellow employees regarding this investigation. You were given specific instructions by this Employee Relations Administrator and Kathy Campbell from the EEO Department on April 24, 1996, not to discuss with anyone awareness of or issues concerning the investigation. [GC Exh. 2.]

The Respondent's May 1 letter thus states that part of the reason for Gutierrez' suspension was his protected activity.⁴ I credit this admission. The Respondent argues that Duca's testimony demonstrated that it would have suspended Gutierrez in May for the threats to Piccioni, even absent his protected discussions, and therefore that the suspension was not unlawful.

² The Government's complaint did not allege the April 24 counseling of Gutierrez to be unlawful. I find that his counseling was not unlawful under the Act.

³ As noted below, Duca's testimony is only partially credited. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) ("Nothing is more common in all kinds of judicial decisions than to believe some and not all of what a witness says"); *Champion Papers, Inc. v. NLRB*, 393 F.2d 388, 394 (6th Cir. 1968) ("A factfinder—jury, judge or administrative agency—is not barred from finding elements both of truth and untruth in a witness' testimony"); *NLRB v. Pat Izzi Trucking Co.*, 395 F.2d 241, 244 (1st Cir. 1968) ("That part of a witness' testimony is not believable does not of itself destroy the rest").

⁴ The Board found the Respondent violated the Act by broadly prohibiting discussion among employees concerning Conn's medical situation when the discussions concerned their working conditions and the possibility of filing a related grievance

Based on her demeanor, and the May 1 letter, I do not credit Duca's testimony in this regard. I find that the Respondent has not shown that the same action would have taken place regardless of the unlawful reason. *Power Equipment Co.*, 330 NLRB 70, 74 (1999) "An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place".

I find that the Government proved that Gutierrez' discussions relating to working conditions and a possible grievance filing were a substantial motivating factor in the Employer's decision to suspend him. I find that the Respondent suspended Gutierrez on May 1, in part, because he had engaged in protected concerted activity. I further find that this suspension would not have taken place solely because of his threats to a coworker, thus, the Respondent has failed to demonstrate that it would have suspended Gutierrez regardless of his protected discussions. Finally, I find that the Respondent's suspension of Gutierrez violates Section 8(a)(1) and (3) of the Act. *Wright-Line*, 251 NLRB 1083 (1980).

IV. DISCHARGE

On January 30, 1997, Gutierrez was discharged. His discharge notice stated that he was being terminated for leaving the plant premises without permission on January 22, 1997, and after "careful consideration of [his] past work record." Duca testified that the Respondent took Gutierrez' entire disciplinary record into account in deciding to discharge him, and that Gutierrez probably would not have been discharged solely for leaving the premises without permission.

When an employer is charged with discriminating against an employee in violation of Section 8(a)(3), the burden is on the General Counsel to demonstrate that the employee's union or other protected activity was a substantial or motivating factor in the employer's decision. If the General Counsel carries that burden, the burden then shifts to the employer to prove that it would have taken the same action even absent the employee's protected activity. *Wright Line*, supra. As found above, the Respondent violated the Act by its May 1 suspension of Gutierrez. I find that the Respondent did rely on Gutierrez' entire disciplinary record, including his unlawful May 1 suspension, in making the decision to terminate him. I find that the discharge was thus motivated in substantial part by his protected activities and that the Respondent has failed to demonstrate that it would have discharged him even if he had not engaged in protected discussions. I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it terminated Gutierrez on January 30, 1997. *Soltech, Inc.*, 306 NLRB 269, 279 (1992) (Reliance on discipline issued in violation of the Act as a motivating factor for a subsequent discharge is sufficient to establish a prima facie case that the discharge violates the Act).

CONCLUSIONS OF LAW

1. Lockheed Martin Astronautics is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Plant Guard Workers of America, Local 265 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Lockheed Martin Astronautics, Littleton, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending or discharging Lee Gutierrez, or any other employee, because they engage in union or other protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Lee Gutierrez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Lee Gutierrez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Lee Gutierrez and within 3 days thereafter notify him in writing that this has been done and that his suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents 10 for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135(1999).

(e) Within 14 days after service by the Region, post at its facility in Littleton, Colorado, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals for the _____ Circuit."

by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 1996. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend or discharge Lee Gutierrez, or any other employee, because they engage in union or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Lee Gutierrez full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Lee Gutierrez whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Lee Gutierrez and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his suspension and discharge will not be used against him in any way.

LOCKHEED MARTIN ASTRONAUTICS